The Role of Dignity in Equality Law: Lessons from Canada and South Africa

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The role of dignity in equality law: Lessons from Canada and South Africa

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This paper examines the link made on occasion between the concept of dignity and substantive equality; it is further noted that dignity can have very different meanings in different contexts. While the notion of dignity does not often play a substantive role in the resolution of decisions, sometimes the underlying understanding of dignity does matter. However, in all cases, judges should avoid the temptation to rely on unarticulated value judgments or subjective notions of dignity. When judges make reference to dignity, they should articulate the values underpinning their conception of it.

Introduction: Empty vessels and unassailable concepts

Equality is a difficult concept. The chief justice of Canada labels it the "most difficult right,"[1] and courts in many different jurisdictions have found grappling with it a challenge. In the United States, an apparently clear three-tier method for dealing with equal protection law has been confounded by the emergence of the "rational scrutiny with bite"[2] and "sliding scale"[3] approaches to equal protection.[4] Canada has seen repeated efforts since the 1990s to define an approach to equality; nonetheless, an apparent reconciliation of views in 1999[5] has not prevented serious disagreement among judges as to the application of the

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[1] Beverly McLachlin, *Equality: The Most Difficult Right*, 14 Sup. Ct. L. Rev. 17 (2001).

[2] The term is coined in Gerald Gunther, *The Supreme Court, 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection*, 86 Harv. L. Rev. 1 (1972). For an application see Romer v. Evans, 517 U.S. 620 (1996).

[3] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 71 (1973) (Marshall. J., dissenting), City of Cleburne v. Cleburne Living Center 473 U.S. 432, 451 (1985) (Stevens, J., concurring).

[4] For a contrast of the U.S. and Canadian approaches to equality, see Claire L'Heureux-Dube, *Realizing Equality in the Twentieth Century: The Role of the Supreme Court of Canada in Comparative Perspective*, 1 Int'l. J. Const. Law (I•CON) 35 (2003).

[5] Law v. Canada (Minister of Immigration), [1999] 1.S.R.C. 497. *See* Donna Greschner, *Does Law Advance the Cause of Equality?*, 27 Queen's L. J. 299 (2001); Emily Grabham, Law v. Canada: *New Directions for Equality under the Canadian Charter*, 22 Oxford J. Legal Stud. 641 (2002).

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equality test.[6] The same is true, if not quite to the same extent, in South Africa, where the Constitutional Court, early in its history, set out a test for equality[7] that has seen important split decisions in its application.[8]

Some of this controversy may reflect a point made with vigor by Peter Westen in the 1980s—that equality is an essentially empty concept.[9] The formal conception of equality—that likes should be treated in a similar manner and those that are unlike treated differently, according to their differences—is, as Westen argued, a meaningless concept, since everything depends on the substantive rule by which one defines what is alike. The emptiness of formal equality makes it tempting to flesh out equality with more substantive concepts. Sandra Fredman identifies specific values that can be used to develop a conception of equality: distributive justice, remedial aims, participation, and dignity.[10] In this unpromising context, some judges and commentators have turned to "dignity" to provide guidance. This is especially so in Canada and South Africa (countries often suggested as models for equality law),[11] though the concept of dignity has also attracted attention from commentators elsewhere;[12] and recent European directives on equality refer to the aim of protecting dignity.[13]

Dignity is an unassailable value,[14] and, as such, it may serve as an irrefutable argument.[15] It is also an ambiguous concept, one which conceals very different ideas of what constitutes a life with dignity. Despite this ambiguity,

[6] *See, e.g.*, Gosselin v. Attorney General of Quebec, *infra* note 95, and other cases discussed later for examples of strong disagreement among the judges. Some important decisions are not so fractured: Nova Scotia (Workers Compensation Board) v. Martin, [2003] 2 S.C.R. 504; Trociuk v. Attorney General of British Columbia, [2003] 1 S.C.R. 835.

[7] *President of the Republic of South Africa v. Hugo* 1997 (4) SA 1 (CC); and *Harksen v. Lane* 1997 (11) BCLR 1489 (CC), at paras. 50–53.

[8] In *Hugo* and *Harksen* themselves, but also in *City Council of Pretoria v. Walker* 1998 (2) SA 363 (CC); and *Robinson v. Volks* 2005 (5) BCLR 446 (CC).

[9] Peter Westen, *The Empty Idea of Equality*, 95 Harv. L. Rev. 537 (1982).

[10] Sandra Fredman, Introduction To Discrimination Law (Oxford Univ. Press 2002); Denise Reaume, *Discrimination and Dignity*, 63 La. L. Rev. 645, 647 (2003).

[11] Evadne Grant & Joan Small, *Disadvantage and Discrimination: The Emerging Jurisprudence of the South African Constitutional Court*, 51 Northern Ireland Legal Q. 174 (2000).

[12] *See* Gay Moon & Robin Allen, *Dignity Discourse in Discrimination Law: A Better Route to Equality?*, 2006 Eur. Hum. Rts. L. Rev. 610; Gay Moon, *From Equal Treatment to Appropriate Treatment*, 2006 Eur. Hum. Rts. L. Rev. 695.

[13] The Equal Treatment Amendment Directive, Council Directive 2002/73/EC (Sept. 2002) art. 2.3.

[14] Roger Gibbins, *How in the World Can You Contest Equal Human Dignity?*, 12 Nat'l J. Const. L. 25 (2000).

[15] Dietrich Ritschl, *Can Ethical Maxims be Derived from Theological Concepts of Human Dignity, in* The Concept of Human Dignity In Human Rights Discourse 93 (David Kretzmer & Eckart Klein eds., Kluwer 2002).

courts have resorted extensively to the concept.[16] It is a constitutional right in Germany,[17] Hungary,[18] Israel,[19] and South Africa,[20] among others,[21] while in the European Convention on Human Rights the prohibition of "inhuman and degrading treatment" may be seen as a negative formulation of the right to dignity.[22] In some of these jurisdictions, dignity may serve as the springboard for a series of rights.[23] Dignity is laid down as a guiding principle in other constitutions[24] and in international human rights law,[25] while some scholars discern a commitment to dignity in statutory policy.[26] Judges of the U.S. Supreme Court, including Justices William Brennan,[27] Antonin Scalia,[28] and Anthony Kennedy,[29] have referred to dignity. Whether stated as a right or a principle, dignity may be invoked to justify limiting other rights.[30] The focus in this paper is on one specific use of dignity—as a value used to ground or give direction to the concept of equality.

[16] David Feldman, *Human Dignity as a Legal Value–Part 1*, Pub. L., Winter 1999, at 682; and David Feldman, *Human Dignity as a Legal Value–Part 2*, Pub. L, Spring 2000, at. 61.

[17] Grundegesetz (GG), art. 1. *See* Edward Eberle, Dignity and Liberty (Praeger 2002); Christian Starck, *The Religious and Philosophical Background of Human Dignity and its Place in Modern Constitutions, in* The Concept of Human Dignity, *supra* note 15.

[18] A Magyar Köztársaság Alkotmánya (Hungary Const.), art. 54. *See* Catherine Dupre, Importing The Law In Post-Communist Transitions: The Hungarian Constitutional Court And The Right To Human Dignity 65–86 (Hart 2003).

[19] Basic Law: Human Dignity and Liberty, 5752–1992, 45 LSI 150 (1992) (Isr.).

[20] S. Afr. Const. 1996, § 10.

[21] Vicki Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 Mont. L. Rev. 15 (2004).

[22] Jochen Frowein, *Human Dignity in International Law, in* The Concept of Human Dignity, *supra* note 15, at 124–129.

[23] *See* Dupre, *supra* note 18, at 67.

[24] Ir. Const., 1937, pmbl.; S. Afr. Const. 1996, §§1, 7.

[25] Universal Declaration of Human Rights, G.A. Res. 217A, arts. 1, 22, and 23, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc A/810 (Dec. 12, 1948).

[26] Conor Gearty, Principles Of Human Rights Adjudication 84–114 (Oxford Univ. Press 2004).

[27] Schmerber v. California, 384 U.S. 757, 770 (1966); Goldberg v. Kelly, 397 U.S. 254, 264–265 (1970).

[28] Criticizing affirmative action in City of Richmond v. J.A. Croson Co., 488 U.S. 469, 527 (1989) (Scalia, J., dissenting, citing Alexander M. Bickel, The Morality of Consent 133 (Yale Univ. Press 1975)).

[29] Lawrence v. Texas, 539 U.S. 558 (2003) (striking down an antisodomy law), discussed in Maxine Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 Neb. L. Rev. 740 (2006). *See also* Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992).

[30] The European Court of Human Rights dismissed a claim that the judicial decision to abolish the common law rule that a husband could not rape his wife was inconsistent with the principle that criminal laws are nonretrospective. The Court relied upon the serious threat to human dignity posed by rape in justifying its decision. C.R. v. United Kingdom, App. No. 20190/92, 21 Eur. H.R. Rep. 363, para. 42 (1995).

Canada and South Africa have detailed constitutional guarantees of equality. Section 15 of the Canadian Charter of Rights and Freedoms reads:

> (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.Under section 1 of the Charter, a measure that violates section 15 may still be saved if it satisfies a proportionality test: restrictions on a right that can be shown to be necessary to pursue a legitimate state interest are constitutional.[31]

The Constitution of South Africa provides more guidance on equality. Section 9 states:

1. Everyone is equal before the law and has the right to equal protection and benefit of the law.
2. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
3. The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
4. No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (2). National legislation must be enacted to prevent or prohibit unfair discrimination.
5. Discrimination on one or more of the grounds listed in subsection (2) is unfair unless it is established that the discrimination is fair.

[31] Section 1 reads: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Dickson CJC comments on section 1 in R. v. Oakes, [1986] 1 S.R.C. 103.

As in Canada, in principle, a measure that violates this section can be justified if it satisfies a proportionality test.[32]

This paper examines how judges in Canada and South Africa have referred to the concept of dignity in developing equality law. The argument is made that, in many instances, the concept does not serve a useful legal purpose and, moreover, that there are dangers in introducing the ambiguous concept of dignity into equality analysis.

1. The meaning of dignity

That dignity is difficult to define is a commonplace.[33] There is a danger in relying on a reflexive approach to the idea, which could cover almost any imaginable moral or ethical position and be little more than a so-called "gut reaction" or an unarticulated reliance on what judges presume to be socially desirable or acceptable.[34]

Dignity has a long history, with antecedents in religious thought[35] and early Western philosophy.[36] It has had many different interpretations in that long history, including connotations of social status[37] or personal honor.[38] Also encompassed within the term is the notion of the dignity of humanity as a

[32] Section 36.1 of the South African Constitution:

1. The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including
   a. the nature of the right;
   b. the importance of the purpose of the limitation;
   c. the nature and extent of the limitation;
   d. the relation between the limitation and its purpose; and
   e. less restrictive means to achieve the purpose.

[33] *See, e.g.*, Fredman, *supra* note 10, 19.

[34] "Dignity is said to be vague to the point of vacuous and, therefore, too easily useable to dress up decisions based on nothing more than conservative gut reaction or excessive deference to Parliament." Reaume, *supra* note 10, at 646, summarizing the views of critics of dignity.

[35] Perry disputes the possibility of separating "dignity" from religious origins. Michael Perry, Toward A Theory of Human Rights: Religion, Law, Courts (Cambridge Univ. Press 2006).

[36] Bloch traces it in different guises to the ancient Greeks and Romans, while others specify Cicero as a Roman source later made popular by Pufendorf in the seventeenth century. Ernst Bloch, Natural Law And Human Dignity (M.I.T. Press 1988).

[37] Discussed in Michael Meyer, *Dignity as a Modern Virtue, in* The Concept of Human Dignity, *supra* note 15.

[38] This idea may still be reflected in defamation or related civil wrongs.

species, which is often invoked in discussions of genetics,[39] end-of-life decisions, and reproductive technologies.[40] Such a view of dignity may have force even after a person's death[41] or before their birth.[42]

What is essential to the human species or human nature is controversial. For many years, Irish courts limited the application of equality law to distinctions that affected the "essential attributes" of the human person. This produced some very odd decisions, including a first-instance ruling to the effect that excluding women from juries was nondiscriminatory because jury service was not an essential human attribute.[43]

"Dignity" may refer to a life that is led according to an ethical ideal of the virtuous or the "good life," an approach that also may be controversial. Deryck Beyleveld and Roger Brownsword give the example of German and French cases where courts prohibited peep shows and the carnival practice of dwarf throwing, relying on the notion of dignity;[44] more recently, a French court invoked dignity to ban a controversial Benetton ad.[45] In one South African case, judges held that prostitution is a diminution of human dignity and violates the principle that the human body should not be made into a commodity.[46] A substantive

[39] Deryck Beyleveld & Roger Brownsword, *Human Dignity, Human Rights and Human Genetics,* 61 Mod. L. Rev. 661 (1998).

[40] Feldman, *Human Dignity as a Legal Value–Part 1*, *supra* note 16, at 684. A recent European Court of Human Rights case involved a woman who wanted to use stored fertilized ova but was prevented from doing so because her estranged husband denied his consent. Dignity was invoked both to defend and condemn the restriction in Evans v. United Kingdom, App. No. 6339/05, 2007 Eur. Ct. H.R., para. 89 of the judgment and para. 13 of the joint dissenting opinion.

[41] Such a conception of dignity may apply in situations where an individual is dead. As the German Federal Constitutional Court puts it: "It would be incompatible with the constitutional commandment that human dignity is inviolate … if a person, possessed of human dignity by virtue of his personhood, could be degraded or debased … even after his death." Mephisto case, Bundesverfassungsgericht [BverfG] Feb. 24, 1971, BVerfGE 30, 173, *in* Constitutional Jurisprudence of the Federal Republic of Germany 302–303 (Donald Kommers, ed., Duke Univ. Press 1997).

[42] The European Court of Human Rights suggests that the capacity of a fetus to become a person "require[s] protection in the name of human dignity": Vo v. France, App. No. 53924/00, 2004 Eur. Ct. H.R. para. 84. *See also* the German abortion decisions in, Constitutional Jurisprudence of the Federal Republic of Germany, *supra* note 41, at 336–359.

[43] The ruling was overturned on appeal. *See* John Kelly, Gerard Hogan & Gerry Whyte, The Irish Constitution 719 (Butterworths 1994).

[44] Beyleveld & Brownsword, *supra* note 39, at 662. The French law was approved by the United Nations Human Rights Committee in Wackenheim v. France, Communication No 854/1999, U.N. Doc. CCPR/C/75/D/854/1999 (2002), *cited in* Moon & Allen, *supra* note 12, at 642.

[45] Decision of the Cour d'Appel de Paris, May 28, 1996, *cited in* Walter Van Gerven et al., National, Supranational and International Tort Law: Scope of Protection 184 (Hart 1998).

[46] *Jordan v. S.* 2002 (6) SA 642 (CC) at para. 74, (O'Regan and Sachs, JJ.).

or "thick"[47] conception of the good life may be problematic in constitutional law if it requires judges to choose between competing conceptions of the good life or restricts another value linked to dignity, namely, autonomy.

Kant's moral writings link dignity, equality, and autonomy intimately.[48] A rational being has the ability to act morally. This capacity to act morally confers a worth on the rational being that is beyond price and this "unconditioned and incomparable worth" is termed dignity.[49] This leads to one version of the categorical imperative: that persons should not be treated merely as means but, rather, as ends in themselves.[50] For Kant, "Autonomy is therefore the ground of the dignity of human nature."[51]

One interpretation of this idea may put the emphasis on the free choice of the individual regardless of circumstances. Dignity as autonomy has often been criticized as being too individualistic.[52] The notion may lead to justifying a minimalist laissez-faire state—Robert Nozick explicitly invokes the Kantian categorical imperative in developing his notion of a minimalist state.[53] An excessive focus on autonomy as free choice may condemn social protection measures as limiting free choice and so failing to respect dignity.[54]

Although an individualistic emphasis on free choice may be one interpretation of Kantian dignity, it is not the only one. John Rawls connects Kant's notion of treating persons as ends in themselves[55] to the "bases of social respect"—how an individual feels valued in his or her community.[56] This is essential to an individual's self-respect, without which life may seem to lack value or meaning.

[47] Michael Walzer, Thick and Thin (Univ. of Notre Dame Press 1994).

[48] Immanuel Kant, The Moral Law: Groundwork of the Metaphysics of Morals 434–440 (Hutchinson 1948) (1785).

[49] *Id. at* 436.

[50] *Id. at* 429, 434. I am grateful to Joanne Conaghan of Kent Law School for a discussion on this aspect. For a South African judicial reference to the Kantian ideal see *Dodo v. The State* 2001 (3) SA 382 (CC) at para. 38. This version of the categorical imperative underpinned the decision of the German Constitutional Court to invalidate a law authorizing the shooting down of hijacked airliners. Oliver Lepsius, *Human Dignity and the Downing of Aircraft*, 7 German L.J. 761, 767 (2006).

[51] Kant, *supra* note 48, at 436.

[52] Dennis Davis, Democracy and Deliberation: Transformation and The South African Legal Order 78 n.26 (Juta 1999).

[53] Robert Nozick, Anarchy, State And Utopia 29–31 (Blackwell 1975).

[54] For a view that human dignity is best protected by economic rights and trade agreements, see John McGinnis, *The Limits of International Law in Protecting Dignity*, 27 Harv. J. L. & Pub. Pol'y 137 (2003).

[55] Teuber explains how Nozick and Rawls interpret Kant differently on this point. Andreas Teuber, *Kant's Respect for Persons,* 11 Pol. Theory 369, 370 (1983).

[56] John Rawls, A Theory Of Justice 62, 178, 440 (Oxford Univ. Press 1972).

Public arrangements that express contempt or, importantly, indifference to an individual's life plans are not acceptable.[57] This more socially oriented notion of dignity incorporates both a subjective element (how the individual feels valued in the society)[58] and a more materialistic conception; for Rawls, an individual's self-respect may be devalued if social goods are unequally distributed (unless an unequal distribution works to the benefit of the least advantaged in society). Such a view, rather than questioning the legitimacy of social protection measures, regards them as intimately linked to dignity.[59]

A final, more materialistic conception of dignity again relates it to social goods. This notion eschews the subjective question of how a person feels; rather, it asks whether social goods are equally distributed to everyone's material benefit. The spirit of this approach is best captured in international human rights texts, which invoke "human dignity"—in the sense of our common humanity[60]—to ground human rights and equality. Such texts then condemn any "distinction, exclusion or restriction" that nullifies the "recognition, enjoyment or exercise" of rights in the "political, economic, social, cultural, civil or any other field" on the grounds specified in the international texts, such as gender, race, or disability.[61] Aside from providing a foundation for our sense of common humanity, the idea of dignity may have little further function in this regard.[62] The focus is, rather, on an approach that, according to Justice Albie Sachs, "acknowledges that there are patterns of systemic advantage and

[57] *Id.* at 338. This is closer to Kant's own views. *See* Kant, *supra* note 48, at 423.

[58] For commentary that dignity is perplexing in having these subjective and objective dimensions, see Feldman, *Human Dignity as a Legal Value–Part 1*, *supra* note 16, at 685–686.

[59] In Germany, dignity requires the provision of a social welfare safety net. Starck, *supra* note 17, at 192–193. South African courts have emphasized the interrelationship between dignity, social security, and equality. *See, e.g.*, *Khosa v. Minister of Social Development and Others* 2004 (6) BCLR 568 (CC).

[60] Sandra Fredman, *From Deference to Democracy: The Role of Equality under the Human Rights Act 1998*, 122 Law Q. Rev. 53, 72 (2006).

[61] Convention on the Elimination of Discrimination against Women, art. 1, G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46 (Dec. 18, 1979). *See also* Convention on the Elimination of all Forms of Racial Discrimination, art. 1.1, G.A. Res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195 (Dec. 21, 1965); and Article 1 of the 2007 Convention on the Rights of People with Disabilities (not yet in force).

[62] Such an approach may well not require dignity: Christopher Essert, *Dignity and Membership, Equality and Egalitarianism: Economic Rights and Section 15*, 19 Canadian J. L. & Jurisprudence 407 (2006).

disadvantage based on race and gender that need expressly to be faced up to and overcome if equality is to be achieved."[63]

Judicial considerations of dignity do not always clarify which conception of dignity is operative or, in the given circumstances, preferred. In the landmark case of *Law v. Canada,* the Supreme Court of Canada was faced with a claim by a thirty-year-old woman that a statute denying her survivor's benefits because she was under thirty-five was discriminatory. Justice Frank Iacobucci discussed the idea of dignity in the context of section 15 of the Canadian Charter, elaborating a three-stage test for determining whether a measure was discriminatory:

- Did the case involve a formal distinction or a differential impact?
- Was it based on one of the grounds mentioned in section 15 of the Charter or an analogous ground?
- If so, did it violate the purpose of the Charter?[64]

In the third part of the three-stage inquiry, Justice Iacobucci explains that human dignity becomes crucial to the purpose of the Charter:

> Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society per se, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the

[63] More fully, Justice Sachs says:

"Rather … [the substantive approach to equality] focuses on whether it serves to advance or retard the equal enjoyment in practice of the rights and freedoms that are promised by the Constitution but have not already been achieved. It roots itself in a transformative constitutional philosophy which acknowledges that there are patterns of systemic advantage and disadvantage based on race and gender that need expressly to be faced up to and overcome if equality is to be achieved. In this respect, the context in which the measure operates, the structures of advantage and disadvantage it deals with, the impact it has on those affected by it and its overall effect in helping to achieve a society based on equality, non-racialism and non-sexism, become the important signifiers." *Minister of Finance v. Van Heerden* 2004 (11) BCLR 1125 at para. 142. Justice Sachs' approach to substantive equality in this passage does not refer to "dignity," though he later mentions it. He invokes it in different senses, including referring to the establishment of "national dignity" achieved through the creation of a just society. *Id.* at para. 145.

[64] Law v. Canada (Minister of Immigration), [1999] 1.S.R.C. 497, para. 39; *see also* paras. 75, 88.

> law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?[65]

This passage sets out a detailed analysis of what dignity means in the Canadian context while allowing for disagreement. Justice Iacobucci combines different conceptions of dignity.[66] The test mentions laws "premised upon personal traits" that would offend autonomy. It asks how the claimant "feels" he or she has been treated and whether that feeling is "legitimate," that is, whether there is a reasonable basis for a feeling that one's dignity has been assaulted. The test refers to responding to the "needs, capacities and merits" of persons and avoiding marginalization. This omnibus approach allows for much disagreement; scholars claim that it is too "abstract"[67] and even "broad, malleable and loaded."[68] In several equality cases discussed below, the differences among the judges may be explained by the emphasis that some give to dignity as autonomy and others to the more social or materialistic conceptions of dignity.[69]

2. The concept of dignity in equality law

Dignity, given its multiple definitions, may be applied in various ways in equality jurisprudence.[70] It may be brought up simply to underscore the importance of equality and nondiscrimination, without itself providing standards for decision making. Judges also may invoke dignity to identify the groups or classifications that equality jurisprudence should concern itself with; alternatively, it may be used as a threshold criterion for determining when a distinction becomes unacceptable. In cases where a nonsymbolic use of dignity is suggested, the concept often adds little to the legal analysis, which is based on more concrete notions, such as the need to combat particular forms of prejudice and stereotypes.

Canadian and South African judges have referred to the concept of dignity to expand the scope of their equality clauses. Section 15 of the Canadian Charter of Rights and Freedoms includes a comprehensive guarantee of equality, outlawing discrimination on a number of "enumerated grounds" (race, religion, gender, age, etc.). Grounds "analogous" to those enumerated are also

[65] *Id.* at para. 53.

[66] Sophia Moreau, *The Wrongs of Unequal Treatment*, 54 Univ. Toronto L.J. 291, 318–320 (2004).

[67] Grabham, *supra* note 5, at 654.

[68] Greschner, *supra* note 5, at 312.

[69] *See* section 3, *infra*.

[70] Other uses of dignity include extending discrimination law to cover harassment, or in deciding cases where rights conflict. Moon & Allen, *supra* note 12, at 631, 644; Rosa Ehrenreich, *Dignity and Discrimination*, 88 Geo. L.J. 1 (1999). Fredman also discusses the role of dignity in avoiding "levelling down." Fredman, *supra* note 10, at 18.

covered; in *Corbiere v. Canada,* the Supreme Court held that a ground is analogous if it is used in a way to impair human dignity.

> The first inquiry is whether the distinction is made on the basis of an enumerated ground or a ground analogous to it. The answer to this question will be found in *considering the general purpose of s. 15(1), i.e. to prevent the violation of human dignity* through the imposition of disadvantage based on stereotyping and social prejudice, and to promote a society where all persons are considered worthy of respect and consideration.[71]

In *Corbiere*, a statute denied Aborigines living away from a reserve any voting rights relating to the reservation. The Supreme Court ruled that the status of being an "off reserve Aborigine" was a ground analogous to those enumerated in section 15 and, therefore, suspect. Like the enumerated grounds, it was a status often used in stereotypes and was not based on merit or personal circumstances but, rather, on a feature that is "immutable or changeable only at unacceptable cost to personal identity."[72] Finding there was a distinction based on an analogous ground, however, was not the final step in determining whether there had been improper discrimination.[73] The next step was to examine whether the distinction was discriminatory in a substantive sense, that is, whether it would impair a claimant's dignity as outlined in *Law v. Canada*.[74] The majority held that the statute, indeed, was discriminatory in the substantive sense, nor was it justified under the limitations test in section 1, since a complete ban on participation by off-reserve Aborigines in the reserve political process was more than a minimal impairment of the right.[75]

The Constitutional Court of South Africa also considers potentially discriminatory certain distinctions, beyond those enumerated in section 9 of that country's Constitution, if they are based, directly or indirectly, on grounds that possibly impair human dignity.[76] If such exists, then the Court must consider whether it is unfair. In deciding whether a specific distinction on an unenumerated ground is improper, one of the factors that the Court considers is whether the measure impinges on the dignity of the persons affected.[77]

While these courts mention dignity in expanding the scope of equality law, it is not clear that the concept is performing some actual function in furthering the courts' reasoning. The majority in *Corbiere* refers to the concept of dignity, but the substantive work in deciding whether "off reserve Aborigines" should

[71] Corbiere v. Canada (Minister of Indian Affairs), [1999] 2 S.R.C. 203 at para. 5 (emphasis added).

[72] *Id.* at para. 13.

[73] *Id.* at paras. 7–8.

[74] *Id.* at paras. 8–11 (referring to Law v. Canada (Minister of Immigration), [1999] 1.S.R.C. 497).

[75] *Id.* at para. 21.

[76] *Harksen v. Lane* 1997 (11) BCLR 1489 (CC), at para. 46.

[77] *Id.* at para. 51.

have voting rights is done by deciding whether the ground for this distinction is based on an immutable or personal characteristic that is difficult to change and is used to stereotype some people harmfully. These concepts can be explained without referring to dignity.

One of the main uses of dignity in comparative constitutional equality jurisprudence is as a threshold requirement, enabling courts to separate distinctions that are constitutionally improper from those that are not. The South African Constitution, for instance, does not prohibit discrimination generally, only unfair discrimination; in determining what is unfair, dignity is "an underlying consideration."[78] For example, a distinction among the owners of land in different areas for fire-control purposes does not affect human dignity and so does not constitute unfair discrimination.[79]

This use of dignity also comes across in the guidelines developed by the Canadian Supreme Court in *Law v. Canada*, the case dealing with survivor's benefits discussed above.[80] Integrating diverse strands from earlier cases,[81] the Court developed the three-stage test already explained. The third inquiry—compliance with the purpose of the Charter—embodies the idea of dignity.[82] Justice Iacobucci identified a range of factors to consider under this heading,[83] including preexisting disadvantage; the relationship between the grounds and the claimant's "need, capacity or circumstances"; the ameliorative purpose of the legislation; the nature of the interest concerned; and whether the law otherwise demeaned the dignity of the claimant.[84]

In *Law*, the distinction was based on the enumerated ground of age. Under the third stage of the test, the Court found there was no violation of human dignity because young people (without disability or dependent children) had a better chance of obtaining employment. Neither was there an improper stereotyping of people under the age of thirty but, rather, the distinction was related to the reality that a young person is better situated to replace the lost benefits with earned income.[85] While "dignity" provides the rubric, the concrete application of the third stage of the *Law* inquiry does the substantive work.

[78] *Robinson v. Volks* 2005 (5) BCLR 446 (CC) at para. 79 (Ngcoco, J., concurring).

[79] *Prinsloo v. Van der Linde and Minister of Forestry and Water Affairs* 1997 (6) BCLR 759 (CC) at para. 41.

[80] Law v. Canada (Minister of Immigration), [1999] 1 S.R.C. 497.

[81] Judge Iacobucci refers to more than a dozen cases, starting with Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143; and including the decisions in Miron v. Trudel, [1995] 2 S.C.R. 418; Egan v. Canada, [1995] 2 S.C.R. 513; and Eldridge v. British Colombia, [1997] 3 S.C.R. 624.

[82] "It may be said that the purpose of s 15(1) is to prevent the violation of essential human dignity and freedom. . . ." Law v. Canada, para. 51.

[83] *Id.* at paras. 59–75.

[84] *Id.* at para. 75.

[85] *Id.* at paras 101–103.

These Canadian and South African examples illustrate some ways in which judges typically refer to dignity at different stages in equality cases. Although dignity does not seem to do any substantive work in these examples, this is not so in all cases. As the next section illustrates, when judges rely on dignity to provide the rational underpinnings for a decision, the inherent ambiguities and resulting dangers of the concept become manifest.

3. The dangers of dignity in an equality jurisprudence

Judges decide issues of equality based on specific articulations of ideas regarding stereotyping, personal characteristics, and the like. "Dignity," on the other hand, is an abstraction, and there is a great deal of leeway for unarticulated value assumptions to enter into judicial decision making.[86] What one person regards as an intolerable assault on human dignity, another may see as incidental, as a part of everyday life.[87] What one person may see as a racist denial of dignity, another may see as legitimate affirmative action. Several Canadian and South African cases are illustrative.

In some situations, it is the relationship between dignity and autonomy that is problematic. For example, both South African and Canadian courts have dealt with allegations of discrimination against unmarried cohabiting heterosexual couples vis-à-vis the rights granted to married cohabiting heterosexual couples. In the Canadian case of *Nova Scotia v. Walsh*,[88] the distinction was a statutory presumption that matrimonial property should be divided equally between the spouses at the end of marriage; this presumption did not apply to unmarried cohabiting couples. In South Africa, in *Robinson v. Volks,* a statute provided that a married person, on the death of a spouse, could apply for maintenance to be paid out of the deceased's estate; this possibility did not exist for surviving members of unmarried cohabiting couples.[89] Both courts, over strong dissents, found there to be no unfair discrimination.[90] The majority stressed the need to respect autonomous choices; where a person or couple chose not to marry and to accept the legal consequences of marriage, these

[86] Fredman, *supra* note 10, at 19.

[87] For instance, in the South African case, *City Council of Pretoria v. Walker*, the Council adopted a policy of not prosecuting residents of more deprived areas for nonpayment of utilities charges, but did prosecute residents of more affluent (predominantly white) areas. The majority found this policy to affect white residents "in a manner which is at least comparably serious to an invasion of their dignity" (para. 82), but Justice Sachs, dissenting, "simply [could not] see how the complainant's rights were affected or his fundamental human dignity impaired by his receiving a summons to pay for something that was due" (para. 127). *City Council of Pretoria v. Walker* 1998 (2) SA 363 (CC).

[88] Nova Scotia v Walsh, [2002] 4 S.C.R. 325.

[89] *Robinson v. Volks* 2005 (5) BCLR 446 (CC).

[90] Nova Scotia v Walsh, [2002] 4 S.C.R. 325 at para. 43; *Robinson v. Volks* 2005 (5) BCLR 446 (CC).at paras. 51–58 (Skweyiya J.) and at paras. 81–87 (Ngcobo, J.).

should not be imposed by a court.[91] The dissenters in both cases pointed out that free choice, in this sort of situation, was often an illusion. In particular, as Justice Sachs wrote, in the South African case, structures of gender discrimination that disadvantage women are not unique to marriage but also affect unmarried cohabiting couples.[92] The dissenters, arguing the frequent absence of choice in such cases, focused specifically on the needs and welfare of disadvantaged persons in concluding that it is unfair to hold persons accountable for their decisions where their autonomy is more theoretical than real. The tension that these cases highlight—between an interpretation of dignity that mandates a protection of a person's autonomy, or free choice, and one that mandates consideration for a person's needs and welfare—reflects a significant divergence in the understanding of the concept of dignity.[93] Any human rights jurisprudence will require judges to make significant moral choices.[94] The competing interpretations of dignity, in particular, allow for unarticulated value judgments to determine their decisions.

The Canadian case of *Gosselin* is instructive.[95] Between 1984 and 1989, Quebec operated a social welfare scheme for the unemployed; to those under thirty it paid two-thirds of the benefit that it paid to those over thirty. Persons under thirty could increase their welfare payments by participating in one of three government-designated work-activity or education programs. The aim of this legislative distinction was to encourage the young and unemployed to acquire education or training to better equip them to rejoin the workforce. The claimant sought to compel the provincial government to compensate fully people under thirty. A divided Supreme Court of Canada rejected this claim, focusing on whether the distinction violated the purposes of the Charter.[96]

Applying the factors listed by Justice Iacobucci in the *Law* case, Chief Justice McLachlin found that young people did not suffer from a history of disadvantage;[97] moreover, they were probably better off than others regarding access to

[91] Nova Scotia v Walsh, [2002] 4 S.C.R. 325 at para. 43; *Robinson v. Volks* 2005 (5) BCLR 446 (CC) at para. 93, (Ngcobo J.).

[92] *Robinson v. Volks* 2005 (5) BCLR 446 (CC) at para. 163.

[93] The tension is not limited to the equality context. One can imagine a case where an individual might refuse medical treatment but doctors would be allowed to invoke dignity to override this expression of free choice. Feldman cites such a case from France. *See* Feldman, *Human Dignity as a Legal Value–Part 2*, *supra* note 16, at 68. Similarly, one can imagine multiple views, based on dignity, as to whether a prisoner on hunger strike should be force-fed. *See* Starck, *supra* note 17, at 187–192.

[94] Ronald Dworkin, Taking Rights Seriously 134–137 (Duckworth 1978); Rory O'Connell, Legal Theory in the Crucible of Constitutional Justice (Ashgate 2000).

[95] Gosselin v. Attorney General of Quebec, [2002] 4 S.C.R. 429.

[96] *Id.* at para. 19.

[97] *Id.* at para. 32.

employment.[98] Further, a genuine relationship between the basis for the distinction and social reality existed; there was a problem of youth unemployment rooted, partly, in the lack of skills among some young people.[99] As far as ameliorative purposes were concerned, McLachlin found this criterion, when applied here, to be neutral.[100] As to the nature of the interests, McLachlin held that the legislature was trying to help younger people to develop skills; that its goal was to "promote the self-sufficiency and autonomy of young welfare recipients."[101] She concluded that the statute did not impair the claimant's dignity.

The dissenting judges dealt very differently with the third principle of the Law test. Justice Michel Bastarache gave a detailed overview of the claimant's circumstances. She had to move house frequently, sometimes ate at soup kitchens or her mother's home, and suffered from a variety of medical problems.[102] He noted that the social assistance scheme was premised on the problem of youth unemployment, indicating that young people suffered a preexisting disadvantage.[103] He observed an underlying assumption in the legislation, namely, that young people needed "punitive measures" to encourage them to take up training opportunities.[104] Because the law expected young people to survive on an income below the official subsistence level, exposing them to the threat of "deep poverty,"[105] which might lead to malnutrition or even more dire circumstances,[106] the dissenters found a violation of section 15. Both the majority and dissenters said they were addressing the same question, that is, whether a reasonable young person under the age of thirty would experience the same impairment of dignity as an older citizen when denied subsistence benefits.[107]

[98] *Id.* at para. 34.

[99] *Id.* at para. 40.

[100] *Id.* at para. 59.

[101] *Id.* at para. 65.

[102] *Id.* at paras. 164–170.

[103] *Id.* at para. 238. *See also* para. 137 (L'Heureux-Dube, J.).

[104] *Id.* at para. 250.

[105] *Id.* at para. 254.

[106] *Id.* at paras. 130–131.

[107] *Gosselin* highlights the concern that dignity (whether related to autonomy or self-respect) may suggest an interpretation of equality that is more sensitive to symbolic violations of dignity rather than to unequal distribution of material benefits. (I am grateful to Sonia Lawrence of Osgoode Hall Law School for this point.) The Kantian sense of dignity is "unconditional" and so, in one sense, is immune to being impaired by changes in material circumstances. Moreau, *supra* note 66 at 295. In the language of political philosophers, it may focus too much on recognition and not on redistribution. Nancy Fraser & Axel Honneth, Redistribution or Recognition (Verso 2001).

Similar issues arise in another age discrimination case from Canada: *Canadian Foundation for Children, Youth and the Law v. Canada*.[108] This case concerns Canadian Criminal Code section 43, which permits parents and teachers to use reasonable force to discipline children. The Supreme Court upheld this section of the code as a basis for a defense against the charge of assault under the third stage of the *Law* test; at the same time, it narrowed the scope of the statute. The majority interpreted the law to prohibit corporal punishment of children under two or over twelve years of age; the use of instruments; blows directed at the head;[109] and to limit teachers' use of force to situations in which they were restraining a child or removing a child from the classroom.[110]

The majority found there was a correspondence between the circumstances, the needs of children, and the measure, when viewed in the overall context of state policy on corporal punishment. Consequently, there was nothing arbitrary or demeaning in the nature or enforcement of section 43. The Court said:

> I am satisfied that a reasonable person acting on behalf of a child, apprised of the harms of criminalization that s. 43 avoids, the presence of other governmental initiatives to reduce the use of corporal punishment, and the fact that abusive and harmful conduct is still prohibited by the criminal law, would not conclude that the child's dignity has been offended in the manner contemplated by s. 15(1). Children often feel a sense of disempowerment and vulnerability; this reality must be considered when assessing the impact of s. 43 on a child's sense of dignity. Yet, as emphasized, the force permitted is limited and must be set against the reality of a child's mother or father being charged and pulled into the criminal justice system, with its attendant rupture of the family setting, or a teacher being detained pending bail, with the inevitable harm to the child's crucial educative setting. Section 43 is not arbitrarily demeaning. It does not discriminate. Rather, it is firmly grounded in the actual needs and circumstances of children.[111]

This view may be no more than a reflexive assertion of a social perception that children should expect some corporal punishment from their parents. If it is more than that, it may highlight the flaws in an approach that stresses autonomy, particularly when dealing with cases involving children, who are not treated, ordinarily, as autonomous agents. The majority also considered the subjective element of the dignity test. While this is always an indeterminate approach, the majority explicitly emphasized the viewpoint of the guardian

[108] Canadian Foundation for Children, Youth and the Law v. Canada, [2004] 1 S.C.R. 76.

[109] *Id.* at paras. 37, 40.

[110] *Id.* at paras. 38, 40.

[111] *Id.* at para. 68.

rather than that of the child. There were dissenting opinions both as to the reasoning and the result. Justices William Binnie and Marie Deschamps found that there was a violation of the equality clause: a law denying children the same protection offered to adults infringed the children's dignity.[112] (Justice Binnie held that the distinction could be justified as a proportionate restriction on the right to equality, at least as regards parents vis-à-vis their children.)[113]

It is not just in the Canadian cases that the reference to dignity may be based on the reflexive assertion of accepted social norms. In *President of the Republic of South Africa v. Hugo,* one of the earliest decisions of the South African Constitutional Court, the Court had to assess the validity of a presidential decision to pardon mothers of young children who were in prison but not fathers. The president based this on the special role of mothers in looking after children[114] (though he may have been influenced, as well, by the specter of releasing large numbers of prisoners into a society worried about crime rates).[115] In upholding this decision, the Court observed that a constitutional ban on unfair discrimination reflected the constitutional purpose of achieving the "establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups";[116] however, it found no such discrimination in this case. It said that the jailed fathers had had their liberty curtailed through conviction and not by the presidential act. While they were disadvantaged in being denied a benefit offered to incarcerated mothers, they could still apply for remission. Therefore, according to the majority, the measure had not impaired the dignity of the jailed fathers.[117] Justice Johann Kriegler dissented. He maintained that the state was relying on a stereotype regarding women's position in society to justify the distinction made in the presidential decision. Relying on a gender-based generalization was itself an affront to dignity.[118]

[112] *Id.* at paras. 72, 220–232.

[113] Justice Louise Arbour dissented on different grounds, finding the legislation violated the section 7 right not to be deprived of life, liberty, and security of the person "except in accordance with principles of fundamental justice." Justice Arbour was very critical of the majority's decision to reinterpret the legislative defense from the law of assault, imposing safeguards not found in the legislative text, or even in the case law. *Id.* at paras. 190–191.

[114] *President of the Republic of South Africa v. Hugo* 1997 (4) SA 1 (CC) at para. 36.

[115] *Id.* at para. 46.

[116] *Id. at* para. 41.

[117] *Id.* at para. 47, (Goldstone J.). Fagan has described the invocation of dignity in Hugo as a rhetorical flourish. Anton Fagan, *Dignity and Unfair Discrimination: A Value Misplaced and a Right Misunderstood,* 14 S. Afr. J. Hum. Rts. 220, 223 (1998).

[118] *President of the Republic of South Africa v. Hugo* 1997 (4) SA 1 (CC) at para. 80 (Kriegler J.).

These cases suggest that the concept of dignity is sufficiently broad so as to allow judges to invoke unarticulated norms to decide difficult issues. This may reinforce stereotypes and prejudices rather than combat them.

4. Conclusion

The temptation to link dignity with equality is strong. In fact, some of the inherent difficulties in the application of the concept of equality may lead some writers to invoke dignity;[119] still, the concept of dignity itself has similar problems. In many cases discussed here, the reference to dignity is redundant; the real work has been done by other ideas, such as the need to combat prejudice and stereotypes and to recognize the needs of members of disadvantaged groups. In some cases, dignity has played a valid role in the analysis; nonetheless, the malleability of the concept makes it controversial.[120] Thus, dignity, rather than resolving the ambiguities that arise in equality discourse, is liable to create further problems.

Given that dignity often seems redundant or controversial, should we then jettison the concept? It may be too late. The concept may already be so embedded in case law and legislation that it must be addressed.[121] If so, we will have to acknowledge its plasticity and find suitable ways to approach it.

Constitutional texts and jurisprudence are replete with concepts as vague as they are inspiring. Judges may be tempted to rely on vague concepts as shorthand for what they perceive to be socially acceptable distinctions; nonetheless, they have a responsibility to impart more detailed content to these concepts. When the task of a judge in constitutional law is to determine whether certain existing practices are constitutional, it is becomes particularly necessary to specify in detail what "dignity" involves, rather than relying implicitly on references to what may be thought of as unassailably acceptable.

The definition offered by Justice Iacobucci, although detailed, is problematic in that it requires imagining how a person may feel and if having that feeling is legitimate, which includes multiple subjective elements. As Fredman and Moreau have argued, encouraging judges to base decisions on what they think other people must be feeling does not give sufficient guidance to the content of dignity.[122] There is an air of unreality about a scenario in which a senior judge

[119] Susie Cowen, *Can 'Dignity' Guide South Africa's Equality Jurisprudence?*, 17 S. Afr. J. Hum. Rts. 34, 48, 55 (2001).

[120] "… it is something of a loose cannon, open to abuse and misinterpretation; it can oversimplify complex questions; and it can encourage … paternalism…." Beyleveld & Brownsword, *supra* note 39, at 662. In the Canadian Foundation for Children case, Justice Binnie similarly warned that dignity should not become an "unpredictable side-wind powerful enough to single-handedly blow away" the protection of the law. Canadian Foundation for Children, Youth and the Law v. Canada, [2004] 1 S.C.R. 76, at para. 72.

[121] Moon & Allen, *supra* note 12, referring to the UK's Equality Act , 2006, c. 3.

[122] Fredman, *supra* note 60, at 72; Moreau, *supra* note 66, at 318–320.

endeavors to understand how, a non-national, a child, or a prisoner may feel. When, as a result of this exercise in empathy, the judge announces that the non-national, child, or prisoner would not feel their dignity violated by an impugned measure, some skepticism is inevitable.

Even where the norms underpinning a notion of dignity are more effectively spelled out, people may reasonably differ on how it should be understood. The South African and Canadian decisions show different understandings of dignity at work. Some judges respect dignity by stressing the role of free choice, such as the free choice of an individual not to take advantage of a legal benefits the status of marriage brings. Others may see the notion of free choice as possibly more problematic and, instead, hold that respecting dignity requires people be given the protections they need. These are value choices judges must to make (and make explicit) if they are to flesh out the content of abstract concepts. In identifying different interpretations of the idea of dignity (as well as equality), judges should make public and clarify the normative basis for the law employing these notions, and, in so doing, invite further public, political, and academic commentary.

If we must use the concept of dignity in equality law, then we need to avoid subjectivity; and while the importance of autonomy[123] should not be discounted the warning of the dissenting judges in *Walsh* and *Robinson* should be heeded. Autonomy is not a practical reality for everyone, and its full realization typically requires attention to the forms of hierarchy and disadvantage that exist in society. The specific factors listed by Justices Iacobucci and Sachs, quoted in section 2 above, may be useful in tackling problems of hierarchy and patterns of disadvantage (in the sense of systematic exclusion from community benefits).[124] A substantive equality jurisprudence must take into account the various mechanisms by which a hierarchy may develop (for example, by way of prejudice, stereotyping, unequal distribution of resources),[125] and it must promote the equal enjoyment of community benefits. For all that it may be a more difficult undertaking than an approach that cloaks value judgments in a rhetoric of dignity, a valid dignity jurisprudence will be one that focuses on real questions of disadvantage. The concept of dignity may embrace these questions; however, its amorphous application runs counter to a finely focused approach.

This paper does not argue against the right to dignity as such, much less against a right not to be subject to inhuman and degrading treatment. However, it argues that the fuzzy concept of dignity may not be a helpful addition to the development of an equality jurisprudence. If judges refer to it, they should spell out the norms underpinning their conception of it. While there is little harm

[123] On self-determination, see Moon & Allen, *supra* note 12, at 627.

[124] *See id.* at 648.

[125] Reaume identifies three types of harm to her specific conception of dignity that are relevant to an equality analysis: prejudice, stereotyping, and "exclusion from benefits or opportunities that are particularly significant because access to them constitute part of the minimum conditions for a life with dignity." Reaume, *supra* note 10, at 672.

that can be done by invoking dignity to expand the scope of equality law, the same is not true when it is used to limit equality claims. In that context, unless firmly anchored to ideas about prejudice, stereotypes, and disadvantage, a recourse to "dignity" may actually hinder the quest for substantive equality.